

MacDonald Machinery Co., Inc. and Local 150, International Union of Operating Engineers, AFL-CIO. Case 25-RC-9930 (Amended)

August 27, 2001

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

**BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN
AND TRUESDALE**

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on April 21, 2000, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows three for and four against the Petitioner, with one challenged ballot, an insufficient number to affect the results.

The Board has reviewed the record in light of the Petitioner's exceptions and brief,¹ has adopted the hearing officer's findings² and recommendations, and finds that a certification of results of election should be issued.

Contrary to our dissenting colleague, we agree with the hearing officer's recommendation to overrule the Petitioner's Objection 8, which alleged that the Employer engaged in objectionable conduct by soliciting and promising to remedy employee grievances during the critical period.

As found by the hearing officer, the Employer had a practice of soliciting and remedying employee complaints. In November 1999, 9 weeks before the Petitioner's organizing drive began and 4 months before the March 13, 2000 representation petition was filed,³ employees at the Employer's South Bend, Indiana facility requested a meeting with Joseph Shimek, the Employer's vice president. During the meeting, the employees raised concerns regarding customer service and complained about some of the working conditions in the shop. Shimek told the employees that he would have to spend more time with the South Bend managers to correct some of the problems, that it would take some time to straighten things out, and that if it took 6 months or a year, he hoped that they would allow him that time. Af-

ter that meeting, Shimek did address and correct certain problems.

The record also indicates that in 1999, i.e., before the commencement of the union campaign, employee Smedley had ongoing talks with Shimek regarding the shop manager's lack of organizational skills. Eventually, on March 10, Shimek discharged the shop manager for failing to make certain customer service changes, and 3 days later Shimek temporarily assumed the service manager position. At that time, Shimek again reassured the employees that he was committed to do whatever it took to have things done the way they needed to be, no matter how long it took.

In early April, Shimek asked Smedley what he could do to improve the shop operation. Although this was after the petition was filed, it was only a few weeks after Shimek had assumed the service manager position. The two discussed some of the changes that Shimek had already made, and Shimek told Smedley "that the changes that had already been implemented took time to initiate, and they needed to make some more changes to improve conditions . . . if he would give them a year to make the shop a better place, and if he (Smedley) was still unhappy, then he (Shimek) would contact the union." (HOR at p. 8)

As an initial matter, we do not find that Shimek's statement to Smedley that, in effect, the Employer needed more time to make the shop a better place, constituted an expressed or implied promise of benefits. See *National Micronetics, Inc.*, 277 NLRB 993 (1985). Such generalized expressions of an employer's desire to make things better have long been held to be within the limits of permissible campaign propaganda. *Id.* citing *Alied/Egry Business Systems*, 169 NLRB 514, 517 (1968). In the instant case, Shimek was reiterating his request that employees allow him the time to make good on his prepetition promise to "straighten things out."

As to the alleged solicitation of grievances, the Board stated in *Traction Wholesale Center Co.*, 328 NLRB 1058 (1999):

When an employer undertakes to solicit employee grievances during an organizational campaign, there is a "compelling inference," which the Board can make, that the employer is implicitly promising to correct the grievances and thereby influence employees to vote against union representation. Such conduct violates the Act. *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), *enfd.* 457 F.2d 503 (6th Cir. 1972).

Thus, when an employer undertakes the soliciting of grievances only after a union has begun to organize its

¹ In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule Objection 5.

² The Petitioner has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

³ All dates hereafter refer to 2000 unless otherwise stated.

employees, the Board may draw an inference that the employer is promising benefits in an effort to persuade its employees that they do not need a union.

In the present case, however, the Employer undertook to solicit employee grievances prior to the onset of the union campaign. As explained above, employees approached Shimek more than 2 months before the advent of the Union campaign to request a meeting to air employee complaints. The Employer could have declined to hold such a meeting. Instead, the Employer held the meeting, and at that meeting the Employer solicited employee grievances and thereafter undertook to resolve them.

The Employer's willingness to listen to employee complaints, its solicitation of their grievances, and its efforts to resolve them are also revealed in Shimek's dealings with Smedley. As explained above, in 1999, again before the onset of the union campaign, Shimek and Smedley held conversations in which Smedley shared his concerns about the shop and the shop manager. Eventually, in an effort to resolve employee grievances and to improve the shop operation, Shimek discharged the shop manager and took on the service manager position himself. It was within this context that Shimek asked Smedley what Shimek could do to improve the shop operation.

Thus, the facts of the present case are clearly distinguishable from the situation described in *Traction Wholesale Center*, supra. Before the Petitioner came on the scene, the Employer had been presented with employee concerns and had begun to address and correct some of these concerns. During this time, Shimek and Smedley had ongoing discussion regarding the deficiencies of the shop manager. Shimek told Smedley and other employees that the changes would take time and that he hoped they would allow him that time. In these circumstances, there can be no "compelling inference" that Shimek's query of Smedley regarding what Shimek could do to improve the shop operation was intended to influence employees to vote against the Petitioner. Rather, it was part of the Employer's ongoing effort to improve its shop operation by identifying problems and correcting them.

Our colleague concedes that, prior to the Union's campaign, the employees approached the Employer about problems. However, she argues that, after *the campaign began, the Employer approached the employees* about possible problems. In our view, the difference is not critical. The significant point is that, both prior to the onset of the union campaign and after, the Employer was willing to listen to the complaints of its employees and to respond to them. There was neither a need nor a warrant

to change this practice simply because of the union campaign. The ultimate question is whether there has been a promise of benefits in order to influence a union campaign. As indicated above, we conclude there was no such promise. To be sure, there were discussions of employee complaints, but these occurred before and after the union campaign began. In the circumstances here, the issue of which party began those discussions is not dispositive. Thus, it makes no difference whether Shimek or Smedley initiated the April discussion regarding how to improve the shop. Shimek had already promised to improve conditions in response to employee concerns. His inquiry to Smedley was within the scope of this original promise and part of an ongoing dialogue with employees.

CERTIFICATION OF RESULTS OF ELECTION

It is certified that a majority of the valid ballots have not been cast for Local 150, International Union of Operating Engineers, AFL-CIO, and that it is not the exclusive representative of these bargaining unit employees.

MEMBER LIEBMAN, dissenting in part.

Contrary to the majority, I would sustain the Union's Objection 8 and find that Vice President Joseph Shimek improperly solicited employee grievances prior to the election by questioning employee Timothy Smedley about what could be done to improve operations in the Employer's shop. The evidence presented by the Petitioner showed that, during the critical period (i.e., between the filing of the petition and the election), Shimek approached Smedley and asked him what Shimek could do to improve operations in the Employer's shop. In response to Smedley's stated concerns, Shimek recounted changes that had recently been implemented, and stated that the Employer needed to make some more changes to improve conditions. Shimek asked Smedley to give him a year to make the shop a better place.

There is no evidence in the record that Shimek had ever approached employees to inquire about their concerns prior to the commencement of the union's organizing campaign. On the contrary, the evidence indicates that on a single occasion several months before the representation petition was filed, a group of employees *approached Shimek* with various complaints. Shimek agreed to meet with them to hear their complaints, and subsequently began implementing changes in response. The record also indicates that Shimek and Smedley had some further discussions prior to the campaign regarding the deficiencies of the shop manager. The Employer later fired the shop manager shortly before the representation petition was filed on March 13, 2000. There is no evidence, however, that Shimek solicited Smedley's complaints about the shop manager. Indeed, the record

indicates that Smedley raised the issue about the shop manager.

Unlike my colleagues, I believe that whether the Employer, as opposed to the employees, initiated discussions about problems in the shop is essential to determining whether the Employer engaged in objectionable conduct. That the Employer took affirmative steps to solicit grievances *after* the petition was filed, but previously had only reacted to employees' initiatives, supports the inference that during the critical period the Employer was implicitly promising to correct the grievances, in contrast to his prior practice. In my view, the Employer cannot rely upon the actions of its employees who actively sought out Shimek hoping that he would address their problems to establish that it had a practice of soliciting grievances prior to the union's organizing campaign. Thus, I find nothing in the record to establish that the Employer had a history of soliciting grievances from employees.

Absent evidence that an employer has a past practice of soliciting grievances prior to the onset of a union campaign, the Board has routinely found such solicitation during the campaign to be objectionable.¹ Because I find that the Employer has not established that it had any such past practice, I would find that Shimek's conduct was objectionable, requiring that the election be set aside.

¹ See *Traction Wholesale Center Co.*, 328 NLRB 1058 (1999), *enfd.* 216 F.3d 92 (D.C. Cir. 2000). See also *Maple Grove Health Care Center*, 330 NLRB 775 (2000). *National Micronetics, Inc.*, 277 NLRB 993 (1985), cited by the hearing officer and my colleagues, is distinguishable. The employer's conduct there was alleged to be an improper promise of benefits, not an improper solicitation of grievances. Thus, the Board in that case did not address whether, under the circumstances presented, the employer's request for a second chance or more time carried an implied promise to remedy grievances. In the circumstances presented here, I find that Shimek's comments did carry such an implied promise, and thus were objectionable in the absence of a past practice of soliciting grievances.